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No. 00-6677
IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,
Petitioner,
vs.
GARY L. JOHNSON,
Director, Texas Department of Criminal Justice,
Institutional Division
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AAMR; ADVOCACY, INC.; THE ARC OF THE UNITED STATES; THE ARC OF TEXAS; AASSID; THE BRITISH INSTITUTE OF LEARNING DISABILITIES; IASSID; AND TASH; IN SUPPORT OF PETITIONER

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Sims v. *Georgia*, 389 U.S. 404 (1967) 6

Stanford v. *Kentucky*, 492 U.S. 361 (1989) 17

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State v. *Moore*, 364 S.E.2d 648 (1988) 6

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Wash. Rev. Code Ann. §§ 10.95.040(2) (West Supp. 1995) 14

INTERNATIONAL SOURCES

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(E/CN.4/RES/2000/65) 19

United Nations, Report of the Special Rapporteur, on
Extrajudicial Summary or Arbitrary Executions,
E/CN.4/1998/68 ADD.3 (1998) 19

ARTICLES, BOOKS AND OTHER SOURCES

AAMR Resolution on Mental Retardation and the Death Penalty, Board Book (1988)) 16

Baroff, G., *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6) (1991) 8, 18

Baroff, G. *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7 (1998) 8

Edgerton, R.B. (1967) *The Cloak of Competence: Years Later*. American Journal of Mental Deficiency. 80 5

Edwards, W., *Execution of People with Mental Retardation: A Violation of National and Customary International Law*, Mental Retardation (April 2000) 19

Ellis, J. & Luckasson, R., *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985) 6

Fulero, S. & Everington, C. *Assessing competency to waive Miranda rights in defendants with mental retardation.* Law and Human Behavior, 19(5) (1995) 5

Gudjonsson, G.H.. *The Psychology of Interrogations, Confessions, and Testimony.*(1992) 5

Gudjonsson, G.H., *A new scale of interrogative suggestibility*. Personality and Individual Differences, 5 (1984) 5

Gudjonsson, G.H., *The relationship of intellectual skills to suggestibility, compliance, and acquiescence.* Personality and Individual Differences, 11 (1990) 5

Heal, L. & Sigelman, C., *Response Biases in Interviews of Individuals with Limited Mental Ability.* Journal of Intellectual Disability Research, 39(4) (1995) 5

Kassin, S., *The Psychology of Confession Evidence.* American Psychologist, 52(3) (1997) 6

Keyes, D. et al., *People with Mental Retardation are Dying, Legally,* 35:1 Mental Retardation 59 (1997) 15

Leo, R.A., & Ofshe, R.J. *The Consequences of false confessions: Deprivations of liberty and miscarriages of*

justice in the age of psychological interrogation. Journal of Criminal Law and Criminology (1997) 5

Perske, R. *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5) (1994). 5

Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58 (1974) 6

Sigelman, C.K., Budd, E.C., Spanhel, C.L., & Schoenrock, C.J., *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19 (1981) . 6

Simpson, S., *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose,* Capital Defense Digest, Vol. 6, No. 2 (1993) 6

STATEMENT OF INTEREST

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation.

Advocacy, Inc. is the federally funded and designated Protection and Advocacy System for individuals with disabilities in the state of Texas. Annually, it represents or advises over 10,000 Texans with physical or mental disabilities, including mental retardation.

The Arc of the United States is a national voluntary association of parents, families and friends of people with mental retardation, along with members who have mental retardation. ARC has a national membership of over 140,000 people organized in some 1,000 local and state-wide chapters.

The Arc of Texas is a voluntary association of persons with mental retardation, their families, friends and those who provide services to them, working to expand opportunities for people with mental retardation and other developmental disabilities to be included in their communities.

The British Institute of Learning Disabilities (BILD), an independent registered charity in the United Kingdom, works to promote good practice in the provision and planning of health and social care services for persons with developmental disabilities and to promote an awareness of the issues which they face as a result of their disability.

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID) is a scientific organization which brings together those working in the field of intellectually disability and promotes the study and understanding of intellectual disability through publications, conferences, national networks, symposia and other activities.

The International Association for the Scientific Study of Intellectual Disabilities (IASSID) is the only world-wide scientific body for the study of intellectual disabilities. Given the inherent difficulties persons with intellectual disabilities, referred to in the United States as "mental retardation," face in the cognitive areas of communication, memory and moral reasoning, IASSID strongly opposes the execution of persons with an intellectual disability.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the USA and Canada and members from thirty-eight countries around the world. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity and quality of life.

None of the parties or their counsel have contributed either monetarily to the preparation of this brief, except that the law offices of Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019 provided printing and copying services. Specifically, only the amici, their members and their counsel have made substantive contributions to the preparation or submission of this brief.

For the reasons set forth in this brief, the *Amici* respectfully urge this Court to grant certiorari to consider the important issues presented in this case.

I. SUMMARY OF ARGUMENT

This appeal arises from the decision of the United States Court of Appeals for the Fifth Circuit to deny Petitioner a Certificate of Appealability in this § 2254 capital habeas proceeding.[1/] In denying petitioner's motion, the court relied on the rule for granting federal habeas relief in petitions filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) as stated in *Miller v. Johnson,* 200 F. 3d 274, 280-81 (5th Cir. 2000): that relief may be grnated if the state court decision 'was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. That standard is met in this case where the state court unreasonably utilized the very same jury instructions in the retrial of petitioner as those found constitutionally infirm by this Court in his first trial, attempting to remedy the infirmity by adding an instruction that would require jury nullification in order to assess a sentence other than death, after finding petitioner guilty of capital murder. Even apart from this issue, the Court should grant certiorari to review the impact of events of the past decade upon the standard defined in that *Penry I* for support of a ban on the execution of persons with mental retardation.

In 1972 this Court found the death sentence of William Henry Furman so harsh, freakish, and arbitrary that it halted executions nationwide. *Furman v. Georgia,* 408 U.S. 238 (1972). Like Penry, Furman was a man encumbered with both

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1/ This *Amicus Curiae* brief is submitted in support of the Petitioner, Johnny Paul Penry. Amici Counsel have personally consulted Tommy Skaggs in the Texas Office of the Attorney General on behalf of the Respondent and Robert Smith on behalf of the Petitioner. There is no opposition to the filing of this amicus brief.

poverty and mental retardation. Despite attempts by the states to remedy the arbitrariness of imposing the death penalty, the disproportionate application of that terrible weight continues to fall upon men with mental retardation and histories of deprivation and abuse.

Johnny Penry is a person with mental retardation. The disabilities that define and accompany mental retardation go to the heart of the meaning of "culpability" and "mens rea." Mental retardation corresponds directly to a defendant's capacity to understand and control his behavior; his ability to comprehend instructions, rules and warnings, included but not limited to *Fifth Amendment* warnings; his ability to participate meaningfully in his own defense; the appropriateness of a particular punishment for unacceptable or unlawful behavior, and the moral blame that should reasonably be attached to that behavior.

Here, we urge relief from a sentence of death imposed in a manner which violates the minimum constitutional standard set for jury instructions in the capital case of a person with mental retardation by the U.S. Supreme Court in the landmark case involving this very defendant. Amici agree with the arguments of Petitioner's counsel regarding the failure of the trial court to offer the jury in the penalty phase of his retrial a reasonable opportunity to consider the mitigating effect of his mental retardation. We, however, focus upon issues central to the interest of the *Amici,* those reasons that mandate a ban upon executing persons with mental retardation because all such executions are violations of the Eighth Amendment proscription against cruel and unusual punishment.

The moral standard for the imposition of any punishment, including and especially capital punishment, is that those who best understand the legal, ethical and moral rules of

a society have the greatest responsibility to obey them and live within them. Yet 28 years after *Furman* and 11 years after *Penry I*, juries continue to assign the most severe penalty, and therefore the greatest culpability to those with substantially diminished cognitive ability, education and life experience. "It is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (*Penry I,* 492 U.S. at 328). "(F)ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character and crime." *Penry I* , quoting *Franklin v. Lynaugh,* 487 U.S. 164, 184 (1988), quoting *California v. Brown*, 479 U.S.538, 545 (1987). There can be no genuine dispute that the nullification instruction given the jury in the Petitioner's retrial prevented that jury from giving a "reasoned moral response" to Petitioner's "background, character and crime."

Johnny Penry, a man compromised by a history of horrifying daily abuse beginning in infancy and with an IQ of 54, may have had some rudimentary sense that what he did was wrong; but what is the measure of his culpability? Sorting through the world's array of murderers, a rational positioning of Penry's culpability among his felonious peers would place him near the lowest in ability to plan, to form an intent. A comparison of his capacity for cunning with others convicted of capital murder would find him among the lowest in cognitive rank. Yet Johnny Penry is a member of that minority of less than 1% of the individuals found guilty of capital murder who were sentenced to death. We would expect that small minority to be composed of the most culpable, most despicable, of felons. Instead we find many among them like Penry, persons with mental retardation, additionally scarred by the burdens of

lifelong rejection, neglect and abuse. Their failures are not theirs alone; they are the failures of society. Johnny Paul Penry is an exemplar of that minority, a man the system of human services, and then the criminal justice system, tragically failed.

Justice Potter Stewart foreshadowed Penry's tragic fate in his opinion in *Furman*, when he wrote "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.... [He is] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."

Amici urge this Court to accept certiorari so that the important issues raised in Petitioner's case may receive a full and fair hearing, and the constitutional and just treatment this Court ordered the State of Texas to provide in his retrial may at long last be accorded him.

II. ARGUMENT

A. ALL MENTAL RETARDATION IS A SEVERE COGNITIVE DISABILITY WHOSE ESSENTIAL NATURE IS DIRECTLY RELEVANT TO THE RELIABILITY OF A DEFENDANT'S CONFESSION, HIS ABILITY TO PARTICIPATE MEANINGFULLY IN HIS DEFENSE, THE DEGREE OF CULPABILITY FOR HIS BEHAVIOR, AND THE SEVERITY OF PENALTY APPROPRIATE FOR HIS BEHAVIOR.

1. The presence of mental retardation is directly relevant to the reliability of defendant's confession.

From their first encounter with a police officer,[2] when they waive their *Fifth Amendment* rights against self-incrimination without understanding them,[3] to the final rap of the gavel as sentence is passed, the criminal justice system frequently fails persons with mental retardation who are accused of criminal conduct. Whether due to a naive tendency to provide more incriminating information about themselves than persons of normal intelligence, a greater suggestibility and vulnerability to the influence of authority figures and the pressures of interrogation, the desire to hide their disability to avoid the stigma attached to it, or an acquiescence rooted in social and cultural adaptation to their disabilities, it is well-documented that persons with mental retardation are more likely than those of normal intelligence to give unreliable, invalid confessions, frequently and alarmingly confessing to crimes they did not commit.[4]

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[2] *See* Perske, R. *Thoughts on the police interrogation of individuals with mental retardation.* Mental Retardation, 32(5), 377-380 (1994).

[3] *See* Fulero, S. & Everington, C. *Assessing competency to waive Miranda rights in defendants with mental retardation.* Law and Human Behavior, 19(5), 533-543 (1995).

[4] See Edgerton, R.B. *The Cloak of Competence: Years Later.* American Journal of Mental Deficiency. 80, 485-497 (1967); Gudjonsson, G.H., *A new scale of interrogative suggestibility.* Personality and Individual Differences, 5, 303-314 (1984); Gudjonsson, G.H., *The relationship of intellectual skills to suggestibility, compliance, and acquiescence.* Personality and Individual Differences, 11, 227-231 (1990); Gudjonsson, G.H.. *The Psychology of Interrogations, Confessions, and Testimony.* (1992); Heal, L. & Sigelman, C., *Response Biases in Interviews of Individuals with Limited Mental Ability.* Journal of Intellectual Disability Research, 39(4), 331-340 (1995); Leo, R.A., & Ofshe, R.J. *The Consequences of false confessions: Deprivations of*

(continued...)

The vulnerability of people with mental retardation to the inherently coercive environment of police interrogation is particularly evident when they respond to "yes - no" questions. They often try to answer questions they do not understand, giving misleading and inaccurate information. This problem has been well-documented in scientific literature,[5] as well as in case law. In the case of *State v. Moore*, 364 S.E. 2d 648, 652-56 (1988) the North Carolina Supreme Court held that a series of "yes, sir" answers did not mean the same thing when spoken by a person with mental retardation as when spoken by a person of normal intelligence,[6] and in *Monroe v. United States*, 463 F.2d 1032 (5th Cir. 1972), responses of this type were found

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[4] (...continued)
liberty and miscarriages of justice in the age of psychological interrogation. Journal of Criminal Law and Criminology (1997); Kassin, S., *The Psychology of Confession Evidence.* American Psychologist, 52(3), 221-233 (1997); Sigelman, C.K., Budd, E.C., Spanhel, C.L., & Schoenrock, C.J., *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19; 53-58 (1981); Perske, R., *Thoughts on the police interrogation of individuals with mental retardation.* Mental Retardation, 32(5), 377-380 (1994). *See also Sims v. Georgia*, 389 U.S. 404 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); and *Culombe v. Connecticut*, 367 U.S. 568 (1961) (mental retardation a significant factor in finding a confession was involuntary and unreliable).

[5] *See* Ellis, J. & Luckasson, R., *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 425-428 (1985); Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58, 58-68 (1974); and Simpson, S., *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose,* Capital Defense Digest, Vol. 6, No. 2, p. 30 (1993).

[6] *See also State v. Ives*, 648 A.2d 129, 133 (Vt. 1994); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254, 259 (1991).

insufficient to constitute a valid waiver of rights even when the defendant's attorney was present.

2. The impact of mental retardation upon a defendant's competence taints every aspect of a criminal prosecution from the time of arrest to the imposition of the penalty imposed upon him.

Defendants with mental retardation are "often unable to understand court proceedings, assist effectively in their own defense, and/or understand the significance of their punishment. Significant impairments in expressive language, reading, and understanding verbal information; short attention span; and deficits in working memory are among the problems they experience. Assessment tools to help determine whether they are competent to stand trial primarily assess court-related vocabulary and information which may be 'parroted' without full understanding. These tests do not assess the fluid cognitive abilities which enable a person to understand their legal defense options. This is especially relevant to important decisional parts of legal proceedings as pleading guilty or not guilty, plea bargaining, weighing outcomes and consequences, and strategies used in testimony and cross examination." *Report of the Criminal Justice Task Force*, State of California, 1998, provided to the library, United States Supreme Court.

These limitations assume great importance in capital cases, looming large in cases like Petitioner's where a psychologist with the Texas Department of Criminal Justice, noting that Penry had the second lowest IQ on death row, testified that there was "considerable doubt as to whether he would comprehend what is really going on at trial." 11 SR 795.

3. Mental retardation diminishes the degree of culpability for criminal behavior.

In no case does an individual with mental retardation have that minimal level of cognitive functioning necessary for logical and moral reasoning sufficient to satisfy the requirements of the Eighth Amendment in capital cases. Although an offender with mental retardation may be aware that his behavior is unlawful, his knowledge and awareness of the degree of wrongfulness in his acts is less than that of a person of normal intelligence. Research shows, for example, that though these defendants may acknowledge that killing or other crimes are wrong, they have great difficulty in explaining *why* they are wrong. Dr. George Baroff relates the attempted explanation by a defendant with mental retardation who, while acknowledging from the witness stand that the rape of an 87-year old woman was "wrong," could not explain why. Pressed for an explanation, he admitted that he had not received "permission." Pressed further, he blurted out, "Maybe it's against her religion!" Baroff, G. *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7, 33-35 (1998).[2] This transparent lack of understanding of the nature of criminality illustrates the impairments inherent in the very definition of mental retardation that relate directly to culpability.

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[2] *See also*, Baroff, G., *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6), 343-349 (1991); Blume, J. and Bruck, D. *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, Arkansas Law Review 41, 731 (1988).

4. The reduced culpability of the offender with mental retardation requires that the penalty for his acts must be less than that of a person with normal intelligence.

People with mental retardation should not be exempt from prosecution, nor should their disability be considered as a reason or excuse for criminal behavior, but the cognitive limitations which necessarily reduce their culpability require that the penalties imposed be *proportionate* in order that justice be served. The construct of culpability has a direct relationship to cognitive ability. In no case is the death penalty a proportionate punishment for a person with mental retardation. As Justice Brennan's *Penry I* dissent reasoned,

> *The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.*" *Penry I*, 492 U.S. at 346

Since this Court's findings in *Furman*, it has been clear that the death penalty is to be reserved for the most culpable of all those convicted of capital crimes. *Zant v. Stephens* 462 U.S. 862, 877 (1983); *Woodson v. North Carolina* 428 U.S. 280, 295-296 & fn. 31 (1986); *Godfrey v. Georgia* 446 U.S. 420, 427, 433 (1980); *Lowenfield v. Phelps* 484 U.S. 231 (1988). To avoid the constitutional flaws identified in *Furman*, the states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Selection of individuals to receive the penalty is,

therefore, not to be based only upon the nature of the offense, but upon the nature of the offender. Less than 1% of those convicted of capital crimes are sentenced to death. It defies logic that individuals like Johnny Paul Penry, who fall into the bottom 2% of the population in cognitive abilities, in their ability to reason and plan, deserve to receive the punishment reserved for the most culpable persons elected to that minority of less than 1% who receive the harshest punishment meted out in our criminal justice system. *See The Penry Penalty: Capital Punishment and Offenders with Mental Retardation*, 23, Reed, E. (1993).

B. JOHNNY PAUL PENRY'S SENTENCE OF DEATH VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEE OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

1. The jury instructions used by the Court in the penalty phase of Petitioner's second trial did not meet the standard set by this Court in this case in 1989.

The Texas sentencing statute which had already been found unconstitutional by this Court in 1989 was reapplied in his second trial in a manner no less unconstitutional. The instruction fashioned by the court as a remedy failed to give the jury an opportunity to reasonably consider and apply the mitigating effect of mental retardation in flagrant disregard of this Court's order that the State must provide such an opportunity in selecting an appropriate penalty for the Defendant's behavior.

The relevance of mental retardation as a mitigating factor relates to its impact upon the defendant's culpability. In the majority opinion in *Penry I*, Justice O'Connor applied the

principles of *Lockett v. Ohio*, 438 U.S. 586 and *Eddings v. Oklahoma*, 455 U.S. 104, crystallized in *Gregg v. Georgia*, 428 U.S. 15 n.3 (1976), that, "punishment should be directly related to the personal culpability of the criminal defendant." Although she did not conclude that the time had come to ban executions of persons like Penry, her discussion of the issue of mitigation firmly married the mitigating effect of mental retardation to the concept of culpability.[8] Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. As Justice O'Connor had earlier explained this concept, if the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987).

Furthermore, the jury instruction utilized by the trial court to accommodate this Court's ruling in *Penry I* was constitutionally flawed by its juxtaposition of "mental retardation" and "future dangerousness" in such a manner as to render the two concepts intertwined in the minds of the jurors. Not only did the instruction present the jurors with an

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[8] Justice O'Connor has been consistent in her focus on blameworthiness and culpability in the capital sentencing calculus. In her dissent in *Enmund* she argued that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund v. Florida, 458 U.S. 782, 825 (1982).* In *Tison* she wrote that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona, 481 U.S. 137, 149 (1987).*

insurmountable and unconstitutional nullification problem, requiring that they violate their oaths and render untruthful verdicts in order to give effect to the mitigating evidence of Penry's mental retardation, poverty, and abuse as a child; but the instruction inextricably linked those mitigating factors with the aggravating one of future dangerousness.

2. The execution of a person with mental retardation is proscribed by the Eighth Amendment as "cruel and unusual punishment" in light of the societal consensus that has evolved since this Court's opinion in this case.

More than 90 years ago, this Court recognized that the constitutional prohibition against cruel and unusual punishments is not a rigid rule, fossilized in its meaning. It "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States* 217 U.S. 349, 378 (1910). In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court again acknowledged the role of societal consensus in determining whether or not a particular criminal penalty is "cruel and unusual." The Court cited *Ford v. Wainwright*, 477 U.S. at 408 (1986) as a case in which the standard was met and possibly exceeded in cases of insanity; but found that the required level of societal consensus had not yet been met in cases of mental retardation. At that time only one state had banned the execution of persons with mental retardation, and the majority of the Court was not persuaded by the opinion polls and resolutions by public interest organizations presented as evidence of such a consensus. The Court noted:

> *The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. Penry I* at 335.

In reaching this conclusion, the Court acknowledged that the Eighth Amendment might prohibit executing persons with profound or severe retardation, reasoning that people whose disability is of such severity are generally excused from criminal responsibility through the defense of insanity (*Penry I* at 305) and there was "more evidence of a national consensus" opposing the execution of persons with mental illness (insanity). The Court thus acknowledged that executing people with profound and severe mental retardation might be "cruel and unusual punishment". *Penry*'s holding could have been reconciled with that acknowledgment, either by drawing the constitutional line explicitly in terms of *degrees* of mental retardation or by attempting to assimilate profound or severe mental retardation into the concept of "insanity."

Neither of these methods of preserving the *Penry I* Court's reading of the application of "evolving standards of decency" (*Trop v. Dulles*, 356 U.S. 86, 101 (1958), *Coker v. Georgia*, 433 U.S. 584 (1977) has been a part of the evolution in case law or societal consensus in the decade since *Penry I*. To the contrary, both within the United States and globally, the unmistakable movement has been to add to the preexisting prohibition against executing persons found to be insane, a prohibition against executing persons with mental retardation, including all people with mental retardation within that classification, rather than to create a singular subclass of those with the most severe mental retardation. In short, the consensus that has emerged since *Penry I* has reflected a growing acceptance of persons with mental retardation in the mainstream of society, in concert with an understanding that

execution of that small minority of persons with mental retardation who commit capital crimes is archaic, barbaric and cruel.

A decade ago, four Supreme Court Justices thought a societal consensus already supported a ban on executing persons with mental retardation. Since then, lower courts have acknowledged the significance of a societal consensus in analyzing Eighth Amendment challenges to the execution of persons with mental retardation (*See* e.g., *Andrews v. Collins*, 21 F.3d 612, 632(5th Cir. 1994). The *Andrews* court found insufficient evidence at that time of a national consensus to override this Court's determination in *Penry I,* citing only three states that had prohibited such executions since this Court's opinion in 1989. Since that time the situation has changed dramatically. Ten more states have passed legislation banning these executions,[9/] bringing the number of states in which an individual with mental retardation cannot be sentenced to death to 26, including the twelve states and the District of Columbia which have statutorily eliminated the death penalty in its entirety.

The emergence of a consensus is also evident by the de facto exemption in ten states where no one or very few persons,

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9/ Ark. Code Ann. §§ 5-4-618(b) (Michie 1993); Colo. Rev. Stat. §§ 16-9-403 (Supp. 1994); Ga. Code Ann. §§ 17-7-131(j) (1990 & Supp. 1994); Ind. Code Ann. §§ 35-36-9-6 (West Supp. 1994); Kan. Stat. Ann. §§ 21-4623 (d) (Supp. 1994); Ky. Rev. Stat. Ann. §§ 532.140 (Michie 1990); Md. Code Ann. Art. 27, §§ 412(g)(1) (1992); Neb. Rev. Stat. §§ 28-105.01(2) (1997); N.M. Stat. Ann. §§ 31-20A-2.1(B) (Michie 1994); N.Y. Crim. Proc. Law §§ 400.27(12) (1995); S.D. Session Law 2000, Ch. 112 (S.D.C.L. §23A-27A-2000); Tenn. Code Ann. §§ 39-13-203(b) (1991 & Supp. 1994); Wash. Rev. Code Ann. §§ 10.95.040(2) (West Supp. 1995).

none of whom has been known to have mental retardation, has been sentenced to death since 1976.[10/] In addition, the statutory provisions in states like Connecticut which do not explicitly refer to "mental retardation," use the same concept, e.g., "The court shall not impose the sentence of death on the defendant if . . . at the time of the offense . . . his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." (Conn. Gen. Stat. §§ 53a-46a(g) (1997)).

The Federal law already prohibits the execution of persons with mental retardation convicted of Federal crimes (The *Federal Death Penalty Act,* 18 U.S.C. § 3596(c)(1994)). This law states that "a sentence of death shall not be carried out on a person who is mentally retarded." In and of itself, this legislation, enacted by the elected representatives of the entire country, demonstrate an evolving national consensus against execution of persons with mental retardation.

Even absent clear statutory mandates, courts have overturned or modified death sentences because the defendant

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10/ Three states, New Jersey, Connecticut, and New Hampshire, have not executed a single person since 1976. New Jersey's last execution was in 1963, Connecticut's was in 1960, and New Hampshire's was in 1939. Idaho, Ohio and Wyoming have each executed only one person since 1976. Montana and Oregon have each executed only two people since 1976. Pennsylvania has executed only three people since 1976. Mississippi has executed only four people since 1976, the most recent of which was in 1989, the year of *Penry I.* None of the 14 people executed by these ten states in the last 24 years was known to be mentally retarded (Denis Keyes, et al., *People with Mental Retardation are Dying, Legally,* 35:1 Mental Retardation 59 (1997).)

has mental retardation.[11/] Opinion polls throughout the nation continue to show that the American people are strongly opposed to executing persons with mental retardation, even in states where the death penalty has the greatest public support.

In 1989 and 1997 the American Bar Association (ABA) adopted a policy opposing the execution of people with mental retardation. In 1987 The ABA published *Criminal Justice Mental Health Standards* opposing the execution of people with mental retardation and mental illness. The American Association on Mental Retardation (AAMR)], the oldest and largest professional organization in the field, has opposed the execution of people with mental retardation since at least 1988, *AAMR Resolution on Mental Retardation and the Death Penalty*, Board Book (1988), 14. The Arc of the United States published its first resolution opposing execution of persons with mental retardation in 1985, *The Application of the Death Penalty to Offenders with Mental Retardation,* and has also incorporated a policy statement on exempting people with mental retardation from the death penalty in its position statement, *Access to Justice and Fair Treatment under the Criminal Law* adopted by the Delegate Body in October, 1998. (The Arc of the United States, 1998). This policy statement provides that the "presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and an inadequate defense that the imposition of the death penalty is unacceptable." These positions mirror ones adopted by every other organization that has joined in this brief as an amicus curiae. Organizations in this country and around the globe with the greatest familiarity with people with

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11/ *See, e.g., Hadley v. Alabama*, 575 So.2d 145 (Ala.Crim. App. 1990); *Arizona v. Jimenez*, 799 P.2d 785 (Ariz. 1990); *Brown v. Florida*, 526 So.2d 903 (Fla. 1988), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

mental retardation, the greatest credibility as to their needs and limitations, have forcefully condemned the practice of executing individuals with mental retardation through policy statements and resolutions. Today they repeat their condemnation of this barbaric practice through their participation as amici.

In addition to these measures of a national societal consensus, standards under international law as well as practices of other nations (*Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988); *Enmund v. Florida,* 458 U.S. 782 (1982) merit this Court's attention. This Court has previously respected such international norms, considering the practices of "civilized nations of the world," and a U.N. survey in analyzing what constitutes "cruel and unusual punishment. (*Trop v. Dulles*, 356 U.S. 86, 104 (1957)). Justice Brennan noted the importance of international norms in his dissent in *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989), where he wrote, "the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." Further evidence of consensus in the international community that execution of persons with mental retardation constitutes "cruel and unusual punishment" is discussed in Section C,1, below.

In 1988, one year before *Penry I*, this Court ruled that execution of a person under the age of 16 was unconstitutionally cruel and unusual punishment, finding a national consensus against the execution of juveniles under 16 at a time when 14 states had rejected capital punishment completely, and another 17 had expressly set a minimum age for capital punishment at 16 or above (*Thompson v. Oklahoma*, 487 U.S. 815 (1988)). The remaining 19 states and the federal government did allow for such executions. Societal consensus does not connote universal agreement. There is at this point in

time more than sufficient evidence of a national consensus against the execution of persons with mental retardation to warrant ruling that these executions violate the Eighth Amendment.

3. The execution of a person with mental retardation is "cruel and unusual punishment" because it fails to effectuate either of the two penological goals which underpin and justify the imposition of the death penalty, namely, retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 182-83, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976).

Deprivation of life is the ultimate deprivation of liberty, so the standard for its application must be very high. The social purpose must be the highest; and the strategy, executions of persons with mental retardation, must be successful in achieving the purpose. Baroff, G., (1991), *supra*. Effectuating retribution requires that the penalty imposed "be directly related to the personal culpability of the criminal offender." *(Tison v. Arizona*, 481 U.S. 137, 149,107 S.Ct. 1676, 1683, 95 L.Ed.2d 127 (1987)). This cannot be the case among persons with mental retardation, in whom, "reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation." (*Penry I*, 492 U.S. at 345, 109 S.Ct. at 2961 (Justice Brennan dissenting).

These same limitations render any deterrent effect of the penalty upon persons with mental retardation highly improbable. Accounts of the behavior and remarks of individuals with mental retardation on the date of their execution are replete with evidence that they are unable to

comprehend the meaning of the penalty even as applied to themselves, much less to be deterred by its imposition on another. Morris Mason asked two of his visitors to tell another death row inmate, "When I get back, I'm gonna show him I can play basketball as good as he can." *Executing mentally impaired prisoners is unjust and cruel*, Sunday Dallas Morning News (November 22, 1998). Rickey Ray Rector asked guards to set aside his piece of pecan pie so he could eat it after his execution. *Ibid.* Indeed, executing persons with mental retardation "is . . . nothing more than the purposeless and needless imposition of pain and suffering." *Thompson*, 487 U.S. at 838, 108 S.Ct. at 2700.

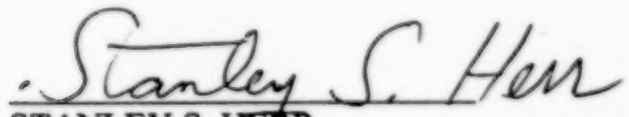
C. PETITIONER'S SENTENCE OF DEATH VIOLATES INTERNATIONAL LAW

It is an accepted principle that international law is part of our law. *The Paquete Habana*, 175 U.S. 677, 700 (1900). International treaties, United Nations resolutions and reports, and customary norms universally condemn the execution of persons with mental retardation. Edwards, W., *Execution of People with Mental Retardation: A Violation of National and Customary International Law*, Mental Retardation (April 2000) and *The Question of the Death Penalty*, U.N. ESCOR, E/CN.4/RES/2000/65). The only State other than the United States that is reported to execute persons with mental retardation is Kyrgyzstan (United Nations, *Report of the Special Rapporteur, On Extrajudicial Summary or Arbitrary Executions*, U.N. Doc.E/CN.r/1997/60 (1996) paragraphs 89, 90). Abolition of the death penalty for people with mental retardation is clearly an emerging norm of national and international law. This is the time for this Court to revisit the constitutional value judgment it made eleven years ago in light of this new evidence of a national and global consensus.

III. CONCLUSION

For the foregoing reasons, the Amici respectfully urge that this Court grant certiorari in this case and provide an opportunity for full and fair review of the grave and unique issues it presents.

Respectfully submitted,



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